the knife or the gloves to anyone in the Witman household. Still they were convinced that the knife belonged to Zach because he had a collection of pocket knifes, along with a collection of toy metal cars, watches, and Pez dispensers.

At trial, the prosecution conceded that it had no motive – that Zach and Greg had a good relationship and that there was no explanation for why Zach would brutally murder his younger brother. The prosecution's case rested primarily on the testimony of a "blood spatter" witness who analyzed the blood in the Witman house and on Zach's sweatshirt. She concluded, based on an experiment she conducted with a blood-soaked sponge, that Zach must have been near Greg when he was stabbed. Significantly, however, although there was blood throughout the downstairs of the house, there was no blood on the stairs or in the upstairs bedrooms. Yet Erynn Jeffries was certain that Zach had spoken to her just minutes before he called 911 from the upstairs phone. There also was no blood on Zach's hair or face, and no evidence that Zach had done anything to clean up before the EMT personnel arrived.

The jury convicted Zach of first degree murder.[1] Zach could not be sentenced to death. He was too young. But, though he was only fifteen when the crime occurred, because he was tried as an adult, once convicted, his sentence was mandatory: life imprisonment without the possibility of parole.

---

[1] At the time of Greg's death, Zach was a 15-year-old boy. Although images of Greg that the jury saw froze him in time as a 13-year-old, by the time the case came to trial in adult court, Zachary had grown into a young man, who at 19 was much physically larger than he had been four years earlier. Doubtlessly, the juxtaposition of the 13-year-old murdered boy and the 19-year-old before them was not lost on the jury.

Because Zach was charged with murder, he was presumptively to be tried as an adult in criminal court. To be transferred to juvenile court he had to establish by a preponderance of the evidence that the transfer would "serve the public interest." 42 Pa.C.S.A. § 6322(a). Zach moved for decertification to the juvenile court and was extensively examined and subjected to extensive psychological testing by psychiatrists and psychologists. Most of the mental health experts agreed that, while Zach was immature for his age, he had no history of violence and that there was nothing to suggest that he was a liar, or manipulative, or had psychopathic or sociopathic tendencies. There was no evidence that he suffered from a mental disease or defect. Several experienced psychiatrists, including Dr. Robert Sadoff, recommended that he be sent to juvenile court because he was uniquely amenable to treatment, given, among other factors, his age, his lack of pathology, his intelligence, the absence of any evidence of drug or alcohol abuse, the absence of any disciplinary problems or criminal history, his ability to form interpersonal relationships, the fact that domestic crimes are rarely repeated, and the fact that he had at least five years remaining for treatment in a juvenile facility. Dr. Sadoff found that Zach was terribly impacted by his brother's death; when asked what he would wish for if he had three wishes, Zach responded that he "wanted Gregory back."

When questioned about Zach's denying his involvement in the crime, Dr. Sadoff, as did other defense experts, acknowledged that whether a youngster admits or denies the crime is a factor that the evaluator must consider. But, in the experts' view, admission and denial are complicated, particularly with a child in a pre-trial setting. A youngster may admit a crime even if he is actually innocent for a host of reasons unrelated to actual guilt or innocence: for example, to protect someone else, or out of fear or compassion for his family. Or, a youngster may admit a crime because he has committed it. That child may not be amenable to treatment if the crime is part of a pattern of behavior and represents an ingrained part of his personality that

is not likely to be changed with treatment. On the other hand, admission of a crime, when it is inconsistent with the youngster's background, would require a closer look at whether the child could be treated.

Denial is equally complicated. The child could be denying for reasons separate from actual innocence – because he is out of touch with reality, because he is not really sure what happened, because he has disassociated, or because of fear. Or, he could be denying because he is actually innocent. Dr. Sadoff testified that a child whose denial was truthful would face enormous pressure to confess, and would benefit from treatment in a juvenile facility. He opined that, at the pre-trial stage, without knowing whether Zach committed the crime, given all the factors, regardless of whether he admitted or denied the murder, he was amenable to treatment in a juvenile facility.

The Commonwealth's psychiatrist, Dr. Larry Rotenberg, in contrast, focused almost entirely on whether Zach had committed the crime. He opined that if Zach did not commit the crime, he did not need treatment so he could be tried as an adult; as he put it, if Zach was innocent "there is no reason to return his jurisdiction to juvenile court." Conversely, denial made it "difficult if not impossible for [Zach] to be treated as juvenile." To Dr. Rotenberg, and the Commonwealth's other experts, acceptance of guilt was crucial. Any juvenile, no matter his personal circumstances, who maintains his innocence must be tried as an adult.

The lower court effectively adopted this reasoning. The court went through the various factors listed in 42 Pa.C.S.A. § 6355, most of which, by their very nature, militate against transfer in a murder case, e.g., the nature and circumstances of the offense and the impact of the offense on the victim and on the community. Obviously, these factors, which focus on the offense and not the offender, will never support transfer when a child is charged with murder.

If a child charged with murder is ever going to be transferred to a juvenile court, it can only be because of the subjective factors that look to the offender and not the offense. When it came to these factors, the court twice characterized it as a "close question" and a "close call." (App. 21) Nevertheless, though commenting that Zach was cloaked with a presumption of innocence, the court emphasized that, in prior cases, only juveniles who had "accepted responsibility" for their actions were transferred to juvenile court, and ultimately concluded that Zach's receptiveness to rehabilitation was questionable given that he denied the crime. (App. 21)

On appeal, the Pennsylvania Superior Court determined that the trial court had not infringed on the presumption of innocence. (App. 38) The Court, however, did not address the crux of petitioner's claim: that the only factor that really mattered in the case – Zach's amenability to treatment – depended on Zach accepting responsibility before trial for his *alleged* actions and that conditioning transfer on a child's admission of guilt, by itself, violated due process.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE EXTRAORDINARILY IMPORTANT QUESTION OF WHETHER THE DECISION TO TRY A CHILD AS AN ADULT CAN DEPEND ON WHETHER THE CHILD ADMITS CULPABILITY FOR THE CRIME

Whether children who are charged with committing crimes have the developmental capacity to make the essential decisions required of the adult criminal defendant is a question still largely unexplored. Yet, increasingly, children are charged as adults and serious questions arise about the procedures that are employed to protect their rights.

There is no uniformity in state laws involving juveniles charged with murder. Children younger than twelve may be charged as adults in many jurisdictions. National Center for Juvenile Justice, http://www.ncjj.org/stateprofiles. In some States, the child is charged in juvenile court and the prosecutor must take steps to transfer the case to criminal court. Other States, like Pennsylvania, automatically treat a juvenile charged with murder as an adult, and it is the child who must establish that it is in the public interest that he be tried as a juvenile.

The consequences to the child of the forum in which he is tried are extraordinary, even life-altering. A 15-year-old who is tried for murder in a juvenile court, if convicted, will receive treatment, usually until he is 21 (although some states have experimented with blended sentencing that permits reconsideration of the sentence if the child is not yet ready for release). But the same child, if convicted in a criminal court, will likely face the most serious sentence the State can constitutionally impose – for Zach Witman, life in jail without the hope of ever being released.[2]

---

[2] The United States is out of step with most of the world on how it treats juveniles charged with crimes. Article 37(a) of the United Nations Convention on the Rights of the Child, November 20, 1989, prohibits life imprisonment without the possibility of parole for offenses committed by persons under eighteen years of age. Currently, only a few nations permit the sentence if the child was under eighteen at the time of the crime. Patricia Goliath, Juveniles and Life Imprisonment, De Rebus, May 2003 at 23 ; Human Rights Advocates, Report to the United Nations Commission on Human Rights, 2005 61st Session: The Death Penalty and Life Imprisonment Without the Possibility of Release for Youth Offenders Who Were Under the Age of 18 at the Time of the Offense, http://www.humanrightsadvocates.org.

The States are free to experiment with different options for addressing juvenile crime. Nevertheless, juveniles are entitled to due process protections in the criminal process. Application of Gault, 387 U.S. 1, 13-14 (1967); Schall v. Martin, 467 U.S. 253, 264 (1984). Consequently, if a State determines that a child charged with murder may be treated as a juvenile, then the procedures for determining whether that child shall be tried as an adult or as a minor must comply with due process of law. The question presented here is whether a system that compels the child to admit to the charged crime as a pre-condition to transfer to juvenile court, and that treats denial of the crime as an evidence that the child cannot be rehabilitated, comports with constitutional standards.

When Zach Witman was forced to choose whether to admit his guilt or maintain his innocence, he was fifteen years old, and, by all accounts, especially immature. Fifteen-year-olds cannot drive, cannot vote, cannot marry, cannot buy cigarettes, alcohol or pornography, cannot sit on a jury, cannot even consent to most medical procedures. This is because "the normal 15-year-old is not prepared to assume the full responsibilities of an adult." Thompson v. Oklahoma, 487 U.S. 815, 825 (1988).

This Court has recognized that children are not capable of making reasoned adult decisions. Thus, though a woman has an almost unfettered constitutional right to choose an abortion, a State may condition that right when dealing with minor females. See, e.g., Lambert v. Wicklund, 520 U.S. 292 (1997); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Bellotti v. Baird, 428 U.S. 132 (1976). As Justice Stevens has written:

The Supreme Court of Nevada has held that imposing a sentence of life without the possibility of parole on a 13-year-old constitutes cruel and unusual punishment. Naovarath v. State, 779 P.2d 944 (Nev. 1989).

> The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. . . .That interest, which justifies state-imposed requirements that a minor obtain his or her parents' consent before undergoing an operation, marrying, or entering military service . . . extends also to the minor's decision to terminate her pregnancy.

Hodgson v. Minnesota, 497 U.S. 417, 445 (1990)(Stevens. J.) (citations omitted).

In the criminal arena, this Court has appreciated the decreased culpability of minors. Nearly twenty years ago, recognizing that a fifteen-year-old lacks the maturity to make completely reasoned decisions, the Court, in Thompson, invalidated the death penalty for any child under the age of sixteen at the time the crime was committed.

Earlier this year, the Court extended Thompson to apply to any child under the age of eighteen when the crime was committed. Roper v. Simmons, 125 S.Ct. 1183 (2005). The Court carefully marshaled the data that establishes that adolescents have an underdeveloped sense of responsibility, are more vulnerable to outside pressures, have unformed characters, are reckless and impulsive and, are generally less morally culpable than adults, and ultimately decided that the Eighth Amendment forbids the execution of anyone who committed a crime under the age of eighteen.[3]

---

[3] The due process issues raised in this Petition also implicate the Eighth Amendment, which, as Thompson and Roper recognize, prohibits punishment that exceeds the moral culpability of the child.

A recent study by the MacArthur Foundation Research Network of Adolescent Development and Juvenile Justice has found that juveniles aged 15 or younger are likely to be impaired in their ability to function as competent defendants. Indeed, about one-fifth of 14-15 year-olds have the adjudicative competence of seriously mentally ill adults. See MacArthur Juvenile Competence Study, http://www.adjj.org. See generally, Elizabeth S. Scott & Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice Policy, 83 N.C. L. Rev. 793, 820-28 (May 2005). The MacArthur results and this Court's recent juvenile death penalty cases and parental consent cases recognize the same fundamental truth: that children reason differently from adults and cannot be expected to make many of the informed decisions that adults face on a daily basis.

Children, of course, often participate in the legal process even before they have the maturity necessary to make decisions of legal consequence. Guardians ad litem are appointed to protect their rights and parents advise and guide their children in their decision-making. But there are some decisions that cannot be delegated to a parent or to a third party. The decision whether to admit or deny culpability for a crime cannot be made by anyone but the child. Consequently, the child is utterly unprotected even though his decision may become the single most important factor in deciding whether he is amenable to treatment in juvenile court.

As this case represents in perhaps its purest form, a judicial system that focuses on whether to try a child as an adult for the crime of murder based on whether the child admits or denies guilt for the crime forces the child to make an uncounseled decision fraught with implications that the child cannot possibly comprehend. Zach Witman was a perfect candidate for juvenile treatment. He had no record, no disciplinary problems, no history of violence. He is neither manipulative nor sociopathic. There is absolutely nothing in his

background that could account for this brutal act. And, as several experts testified, even if he did commit the unfathomable act of murdering his younger brother, he was unlikely to pose a future danger because domestic murderers are rarely recidivists, especially when, as with Zach, there is no pattern of violent behavior.

If Zach had admitted to the crime, it is likely that, with all the factors that militated in favor of his amenability to treatment, he would have been transferred to juvenile court. But, by denying that he killed his brother, in effect, he sealed his fate. Unless acquitted, he faced the ultimate punishment short of death: life in prison without the possibility of parole.[4]

The dilemma faced by Zach Witman, unfortunately, is not unique. There has been a nationwide movement towards trying younger and younger children as adults. By the mid-1990's, forty-eight States allowed children to be charged as adults; twenty-three States have no minimum age at which children can be tried as adults. Laurence Steinberg, Juveniles On Trial: MacArthur Foundation Study Calls Competency Into Question, 18 Criminal Justice Magazine 3 (ABA Fall 2003). Forty-one

---

[4] The position adopted by the Commonwealth essentially precludes an innocent child from ever being transferred to a juvenile court. According to the Commonwealth's experts, if innocent, Zach would be acquitted and would have no need for treatment. Unfortunately, innocent people are sometimes convicted and, as the defense experts testified, a child who is innocent and convicted would desperately need the treatment available in a juvenile facility. If not innocent, which the Commonwealth's experts clearly presumed, then denial signified lack of remorse and an inability to be rehabilitated. A child who is guilty may be unable to face the reality of his guilt; he too needs treatment and, depending on his background, might be amenable to treatment despite his denial of guilt.

States now allow a sentence of life imprisonment without the possibility of parole to be imposed on a juvenile. D. LaBelle, A. Phillips & L. Horton, Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons (ACLU/Michigan, 2004), www.aclumich.org/pubs/juvenilelifers.pdf

Still, despite this trend, many states, like Pennsylvania, recognize that some children, no matter how heinous the act with which they are charged, may be amenable to treatment in the juvenile justice system and should not be incarcerated for the remainder of their lives. Determining which child meets the criteria for juvenile treatment – put another way, determining which child is capable of rehabilitation – is not an easy task. But the Constitution cannot permit that determination to rest on whether a child with limited ability to make mature and reasoned decisions admits or denies his complicity in the charged crime.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

Nathan Z. Dershowitz
Amy Adelson
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Dated: September 30, 2005

APPENDIX

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 5411 CA 1998
vs.	:	Criminal Homicide
ZACHARY PAUL WITMAN	:	

Appearances:

H. Stanley Kebert, Esquire
District Attorney of York County
Marilou V. Erb
Assistant District Attorney
For the Commonwealth

Christina Gutierrez, Esquire
Thomas Kearney, Esquire
For the Defendant

OPINION
WITH FINDINGS OF FACT

Before the Court is Defendant Zachary P. Witman's **PETITION TO RETAIN JUVENILE COURT JURISDICTION PURSUANT TO 42 P.C.S.A., SECTION 6322(a)** and thereafter captioned in the supporting memorandum as a **MOTION TO TRANSFER CASE FROM CRIMINAL PROCEEDINGS PURSUANT TO 42 P.C.S.A., SECTION 6322(a)**. Testimony was heard by the Court on May 7, 1999 and May 13, 1999. Conflicts in calendaring dictated that additional testimony be tendered to the Court by way of deposition. The Defendant waived his right to be present at aforementioned

depositions at the conclsion of the May 13, 1999 proceeding. However, it appears, from the records provided to the Court that the Defendant was indeed present at the depositions taken on May 21, 1999, notwithstanding his earlier waiver. In addition, by agreement of counsel, the record before the Court also includes affidavits from defense witnesses in support of transfer by way of stipulation. Pending review of the affidavits, the Commonwealth preserved the opportunity to cross examine the defense witnesses submitted by affidavit. The Court directed the production of the transcript of the 911 tape, a copy of the 911 tape, and a transcript of the Preliminary Hearing by virtue that the expert witnesses had testified that they were privy to such information as part of their history. These items are deemed part of the record for the purposes of this proceeding. The Court chose not to seek review of the Police investigators notes which likewise were submitted to the experts. These reports, unlike the participants at the transcribed Preliminary Hearing were not subject to the scrutiny of cross examination. The Court directed the Commonwealth to advise whether or not cross examination or further rebuttal testimony would be sought on or before May 28, 1999. No further cross examination or rebuttal has been sought by the Commonwealth and the record is deemed closed as of May 28, 1999.

The following are the facts derived from the record before the Court:

On October 2, 1998, Gregory Witman, age 13, was found dead in his home at 9 Albright Court in New Freedom, Pennsylvania. His brother Zachary Witman, the Defendant who was 15 years, 5 months of age at the time of Gregory's death, called 911 regarding the incident. The Defendant advised the 911 operator that he was home sick and had been sleeping upstairs. He heard a noise which he described as being "like a rustling around." He then came downstairs and saw his brother in the back room. Gregory's throat was cut and was covered with blood. When the 911 operator asked whether the Defendant

thought somebody else did this to Gregory, the Defendant advised that "the two doors are open in the back. One of them is bloody like, like someone grabbed it. It's like cracked too, but nothing's on that one. I don't know", and that "the three doors, the three doors in the back of the house are cracked- - -." Upon advise by the Defendant that his brother was apparently propped on his back against the washing machine, the 911 operator requested the Defendant "to move him a little, so (he) can get him flat on this back-." The Defendant told the operator "Not without touching like all that– it's all bloody." Upon moving his brother the Defendant described the severity of the neck wound to the 911 operator and asked leave to open the garage door for the emergency personnel because his brother was near the garage door.

Police personnel arrived soon after the emergency personnel. The Defendant made somewhat similar statements to both the EMT's and the police. Officer Siggins spoke briefly with the Defendant, and testified regarding that conversation as follows:

> He [the defendant] at first just said he had to call his mom, he had to call his mom. I requested – I got some information from him, his name, why we were there. He said that he was home sleeping. He left a key in the door for his brother to get home. He heard a thud downstairs like something was getting thrown against the wall, came downstairs, found his brother, and called 911. N.T. 2/18/99 at 17.

Chief Childs testified concerning the Defendant's statement as follows:

> At this point he told me he [the defendant] was upstairs sleeping. He heard the front door open, heard the front door close. He heard what

> appeared to be a struggle. And the whole time he's talking to me and relaying this, his voice was elevating, lowering, quivering. And each time he would talk I would have to ask him to calm down and try to speak softly and more clear so I could understand what he was saying.
>
> He then said he heard what appeared to be a struggle. He came downstairs, observed blood on the floor of the hallway, went out into the kitchen and found his brother laying on the floor. I then asked him did he see anyone or hear anything. He said no, and all he kept saying at that point that his brother was suffering, just suffering, just suffering and repeatedly saying that.
>
> He started to become physically upset again where his voice was screaming. He asked to call his mother. He was worried about his dad. I reassured him that we would take care of contacting his parents, and then he looked at me and said, would you please call my mother.
> ...
> I said I would call his mother. How do I get in touch with her? He then told me that her phone number is on the refrigerator door on a piece of paper.
> N.T. 2/18/99 at 71-72.

The police and EMT's described the Defendant's hyperventilation and excitement. The Defendant was taken to the York Hospital for treatment.

Detective Clancy of the District Attorney's office arrived at the hospital between 5:15 and 5:30 p.m. N.T. 3/31/99 at 85. Beginning at approximately 5:45, Detective Clancy spoke with the Defendant for fifteen to twenty minutes. N.T. 3/31/99 at 86-

87. He introduced himself and told the Defendant that he was safe. Detective Clancy began the conversation by talking about soccer and sports. N.T. 3/31/99 at 86. According to the Detective, the Defendant indicated that he "had been home sick from school and that he had stayed in his room, or he had been in his bed all day and that he had heard noises and he thought it was his brother coming home from school. He had been asleep, and that he came down to check on the noise and he saw blood at the front door, and that he found his brother in the laundry room." N.T. 3/31/99 at 87.

Follow-up investigation by police, disclosed at the preliminary hearing, revealed that Gregory Witman had attended school on October 2, 1998 and alighted from the school bus at approximately 3:05 p.m. or 3:06 p.m. at which time he was seen walking toward his house. No testimony was offered at any of the hearings as to the length of time an average person would ordinarily take to walk from the bus stop to the victim's house on Albright Circle, which was apparently about a block and a half away. The Court takes judicial notice based upon the descriptions offered that the house of the Defendant and victim is located in a residential community which is middle to upper middle class in rural but fast developing Southern York County. The 911 operator testified at the preliminary hearing that the call to 911 was received at 3:17 p.m. and 31 seconds. The call was transferred to the Southern Regional Police Dispatcher at 3:17 p.m. and 43—45 seconds. The dispatcher finished speaking with the Defendant at 3:24 p.m. and 59 seconds when it was known that responders to the call had arrived. Fire and Emergency personnel arrived first. The first police officer arrived at the Albright Circle address at 3:25 p.m.

Police discerned no evidence of force entry into the household, nor were there any indicators of a burglary. Further processing of the crime scene, subsequent to the arrival of the police, disclosed a bloody knife and gloves buried under a pine tree near the house in a four-inch deep hole. These items were

apparently found as a result of tracing a path alleged to be discernable through the use of Luminol, a chemical compound which luminates blood-based substances in the dark. We perceive it is the contention of Commonwealth that the illuminated foot path (through Luminol) did not extend beyond the immediate boundaries of the residence but returned into the household. Zachary Witman's father later requested the police to revisit the household to point out screens which had been cut at Gregory Witman's room. N.T. 3/31/99 at pp. 284-285.

We are further apprized that the Defendant has essentially repeated his description of the events of October 2, 1999 to Robert L. Sadoff, M.D., the defense forensic psychiatrist who evaluated him for purposes of the within proceeding.

To determine whether the Defendant should be tried as a juvenile or as an adult, the Court must look to the following provisions of Title 42 of the Pennsylvania Statutes:

Section 6322. Transfer from criminal proceedings

> (a) General rule.–Except as provided in >75 .C.S. § 6303 (relating to rights and liabilities of minors) or in the event the child is charged with murder of any of the offenses excluded by paragraph (2)(ii) or (iii) of the definition of "delinquent act" in section 6302 (relating to definitions) or has been found guilty in a criminal proceeding, if it appears to the court in a criminal proceeding that the defendant is a child, this chapter shall immediately become applicable, and the court shall forthwith halt further criminal proceedings, and, where appropriate, transfer the case to the division or a judge of the court assigned to conduct juvenile hearings, together with a copy of the accusatory pleading and other papers, documents, and transcripts of testimony

relating to the case. If it appears to the court in a criminal proceeding charging murder or any of the offenses excluded by paragraph (2)(ii) or (iii) of the definition of "delinquent act" in section 6302, that the defendant is a child, the case may similarly be transferred and the provisions of this chapter applied. In determining whether to transfer a case charging murder or any of the offenses excluded from the definition of "delinquent act" in section 602, the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest. In determining whether the child has so established that the transfer will serve the public interest, the court shall consider the factors contained in section 6355(a)(4)(iii) (relating to transfer to criminal proceedings).

(b) Order.–If the court finds that the child has met the burden under subsection (a), the court shall make findings of fact, including specific references to the evidence, and conclusions of law in support of the transfer order. If the court does not make its finding within 20 days of the hearing on the petition to transfer the case, the defendant's petition to transfer the case shall be denied by operation of law.

(C) Expedited review of transfer orders.–The transfer order shall be subject to the same expedited review applicable to orders granting or denying release or modifying the conditions of release prior to sentence, as provided in > Rule 1762 of the Pennsylvania Rules of Appellate Procedure.

(d) Effect of transfer order.–Where review of the transfer order is not sought or where the transfer order is upheld the defendant shall be taken forthwith to the probation officer or to a place of detention designated by the court or released to the custody of his parent, guardian, custodian, or other person legally responsible for him, to be brought before the court at a time to be designated. The accusatory pleading may serve in lieu of a petition otherwise required by this chapter, unless the court directs the filing of a petition.

(e) Transfer of convicted criminal cases.–If in a criminal proceeding, the child is found guilty of a crime classified as a misdemeanor, and the child and the attorney for the Commonwealth agree to transfer, the case may be transferred for disposition to the division or a judge of the court assigned to conduct juvenile hearings.

§ 6355. Transfer to criminal proceedings

(a) General rule.–After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this Commonwealth, the court before hearing the petition on its merits may rule that this chapter is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if all of the following exist:

(1) The child was 14 or more years of age at the time of the alleged conduct.
(2) A hearing on whether the transfer should be made is held in conformity with this chapter.
(3) Notice in writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.
(4) The court finds:
(i) that there is a prima facie that the child committed the delinquent act alleged;
(ii) that the delinquent act would be considered a felony if committed by an adult;
(iii) that there are reasonable grounds to believe that the public interest is served the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:

(A) the impact of the offense on the victim or victims;
(B) the impact of the offense on the community;
(C) the threat of the safety of the public or any individual posed by the child;
(D) the nature and circumstances of the offense allegedly committed by the child;
(E) the degree of the child's culpability;
(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
(I) age;
(II) mental capacity;
(III) maturity;

(IV) the degree of criminal sophistication exhibited by the child;
(V) previous records, if any;
(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
(VIII) probation or institutional reports, if any;
(IX) any other relevant factors; and
(iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

(b) Chapter inapplicable following transfer.–The transfer terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition.

(c) Transfer at request of child.–The child may request that the case be transferred for prosecution in which event the court may order this chapter not applicable.

(d) Effect of transfer from criminal proceedings.–No hearing shall be conducted where this chapter becomes applicable because of a previous determination by the court in a criminal proceeding.

(e) Murder and other excluded acts.–Where the petition alleges conduct which if proven would constitute murder, or any of the offenses excluded by paragraph (2)(ii) or (iii) of the definition of "delinquent act" in section 6302

(relating to definitions), the court shall require the offense to be prosecuted under the criminal law and procedures, except where the case has been transferred pursuant to section 6322 (relating to transfer from criminal proceedings) from the division or a judge of the court assigned to conduct criminal proceedings.

(f) Transfer action interlocutory.–The decision of the court to transfer or not to transfer the case shall be interlocutory.

(g) Burden of proof.–The burden of establishing by a preponderance of evidence that the public interest is served by the transfer of the case to criminal court and that a child is not amenable to treatment, supervision or rehabilitation as a juvenile shall rest with the Commonwealth unless the following apply:

(1)(I) a deadly weapon as defined in 18 Pa.C.S. § 2301 (relating to definitions) was used and the child was 14 years of age at the time of the offense; or
(ii) the child was 15 years of age or older at the time of the offense and was previously adjudicated delinquent of a crime that would be considered a felony is committed by an adult; and
(2) there is a prima facie case that the child committed a delinquent act which, if committed by an adult, would be classified as rape, involuntary deviate sexual intercourse, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault), robbery as defined in 18 Pa.C.S. § 3701(a)(1)(I), (ii) or (iii) (relating to robbery), robbery of motor vehicle, aggravated indecent assault, kidnaping,

> voluntary manslaughter, an attempt, conspiracy or solicitation to commit any of these crimes or an attempt to commit murder as specified in paragraph (2)(ii) of the definition of "delinquent act" in section 6302.
>
> If either of the preceding criteria are met, the burden of establishing by a preponderance of the evidence that retaining the case under this chapter serves the public interest and that the child is amendable to treatment, supervision or rehabilitation as a juvenile shall rest with the child.

Under the Juvenile Court Law, Act of June 2, 1933, P.L. 1433, as amended, 11 P.S. ss 243–268, there was no allowance for transfer in cases of murder. Once a prima facie case of felonious homicide was made out, the lower court judge had no alternative but to hold the juvenile for further proceedings in the criminal courts. *Gaskins Case*, 430 Pa. 298, 244 A.2d 662 (1968). See also *Commonwealth v. Schmidt*, 452 Pa. 185, 299 A.2d 254 (1973); *Commonwealth v. James*, 440 Pa. 205, 269 A.2d 898 (1970); *Commonwealth v. Moore*, 440 Pa. 86, 270 A.2d 200 (1970); *Commonwealth v. McIntyre*, 435 Pa. 96, 254 A.2d 639 (1969). In contrast under the Act of July 30, 1970 P.L. 673, the determination of whether the interests of state and society require prosecution of murder on an indictment was vested within the sound discretion of the Common Pleas Court. Compare Act of June 2, 1933 P.L. 1433, amendments of June 15, 1939, P.L. 394, 11 P.S. s 256; *Commonwealth v. Pouls*, 198 Pa.Super. 595, 182 A.2d 261 (1962); *Commonwealth ex rel. Firmstone v. Myers*, 184 Pa.Super. 1, 132 A.2d 707, cert. den. 355 U.S. 962, 78 S. Ct. 520, 2 L.Ed.2d 537 (1957); *Trignani's Case*, 150 Pa.Super. 491, 28 A.2d 702 (1942). *See Commonwealth v. Pyle*, 462 Pa. 63; 342 A2d 107(1975)

Under the 1970 Amendments where murder was charged, treatment as a 'youthful offender' still did not arise as a matter of right. Nevertheless, the fact that the legislature had widened the avenue of juvenile treatment reflected a belief that there will be instances where the young offender's need for care, guidance and control as a juvenile outweighs the state and society's need to apply legal restraint and discipline as an adult. The 1970 Amendment to the Juvenile Act, however, did not specifically address the issue of how the court should proceed and by what standards it should determine when in cases of murder transfer of jurisdiction is warranted.

Murder had always been excluded from the jurisdiction of the juvenile courts. See Act of July 12, 1913, P.L. 711, s 11 as amended, 17 P.S. s 694, *Gaskins Case*, 430 Pa. 298, 244 A.2d 662 (1968). See also *In re Mont*, 75 Pa.Super. 150, 103 A.2d 460 (1954). The Pennsylvania Legislature having continued to place murder, even where a young offender is involved, within the original and exclusive jurisdiction of the adult court, the assumption that the need for adult discipline and legal restraint exists in cases of this heinous nature also was perpetuated. With this in mind it became the juvenile's burden under the Act of 1970 to show that he did not belong in the criminal court. In other words, it is the youth who must prove that he belonged in the juvenile setting by showing his need and amenability to the 'program of supervision, care and rehabilitation' which he would receive as a juvenile. In the event the evidence did not affirmatively demonstrate that he is the kind of youth who would benefit from the special features and programs of the juvenile system and in the event no special reason exists for sparing the youth from adult prosecution and punishment (as for instance, evidence of mental illness or retardation) jurisdiction remained within the criminal court system.

In the *Pyle* case, the appellant based his transfer request on his need for psychiatric treatment. The evidence presented by appellant tended to corroborate that he was 'emotionally

unstable,' and that his problems were 'deep-seated' and 'capable of producing the most dangerous of consequences.' Nevertheless, there was no indication that juvenile facilities would assure rehabilitation commensurate with the serious nature of appellant's problem within the time limitations available to such facilities. The only evidence on this issue came from (*Pyle's*) appellant's own expert, who indicated there was a likelihood it would be necessary to continue treatment beyond appellant's minority and that a successful result would not be accomplished within three years. It was on this basis that the lower court concluded there were reasonable grounds to believe appellant was not amenable to treatment, supervision, or rehabilitation as a juvenile within existing juvenile facilities. In *Pyle, supra*, the Supreme Court specifically concluded that once having determined a prima facie case the Commonwealth did not have to disprove a negative, i.e., that the burden remained on the juvenile.

In 1995 the Pennyslvania legislature made it significantly more difficult to transfer a juvenile charged with homicide to juvenile court. Presently, a juvenile so charged must show not only that he is amenable to treatment, but also that the transfer will serve the public interest. §§6322, *supra*. Clearly, the legislature mandates that the Court begin with the premise that such cases ought to be tried in adult criminal court. It is only when the Defendant can show otherwise by a preponderance of the evidence that the case will be transferred to the juvenile justice system.

The court noted above the factors that must be met under §6355 before the case may be transferred to juvenile court. An analysis of those factors follows below:

(A) The impact of the offense on the victim. We are presented with the severest possible impact on the victim. The crime has caused the death of Gregory Witman. This factor weighs against transfer to juvenile court. We further note that

the Witman family may be considered immediate foreseeable victims of this offense. While we are unable to obtain a victim impact statement from Gregory, the Witmans seeks transfer to the Juvenile Court. This factor weighs in favor of transfer.

(B) The impact of the offense on the community. This crime has clearly impacted the community in and around New Freedom, Pennsylvania. The nature of the crime, as well as the extensive coverage of it by the media, have led to a high degree of concern in the community. The Court must be careful to balance this factor against Canon 3 of the Code of Judicial Conduct, which states in part, "A judge should . . . be unswayed by partisan interest, **public clamor**, or fear of criticism." Canon 3(A)(1). The Commonwealth introduced the minutes from a New Freedom Borough Council meeting, in which it appeared that the Council directed that a letter be sent to York County Probation regarding concerns about the Defendant's bail conditions. The minutes refer to unconfirmed (and unsupported) reports that the Defendant was seen in retail businesses and "unattended" on his property. The granting of bail and the conditions set thereto were issued by the Court according to the mandates of the law predicated upon the record available to the Court. The minutes further reference the difficulties in obtaining information attendant to this Court's gag order. The legal restraint imposed on counsel and the investigators for the parties was necessitated by the Court's constitutional duty to protect the rights of the accused and the integrity of the process. See Addendum Opinion dated October 19, 1998. Thus, we are duty bound by the Judicial Canons of ethics to not place significant weight on the ordinance submitted by the Commonwealth. The Commonwealth also introduced the testimony of Edward Tinder, an elected councilman in the borough of New Freedom. Mr. Tinder testified that the impact of the crime on the community has been to engender fear, anger, and frustration. This is the kind of public clamor by which the Court must not be swayed. Nonetheless, it is clear that the crime for which the Defendant has been charged has made a significant impact on the small

rural community, and has raised genuine and legitimate concerns. This factor favors that the Defendant be tried as an adult.

(C) The threat to the safety of the public or any individual posed by the child. Dr. Robert Sadoff, a forensic psychiatrist who testified on behalf of the Defendant, opined that if the Defendant did, in fact, kill his brother, other members of the community were not likely to be in danger. Dr. Sadoff testified that people who kill once rarely kill a second time, and murders that occur within a family usually end right there, so that people in the community are not at risk. The Court has also received, by way of stipulation, numerous letters from the Defendant's family members, friends, and other acquaintances. These letters attest to the Defendant having no history of disciplinary problems or trouble with authority. They also speak of the care and attention provided to him by the members of his family. This correspondence supports the view that the Defendant would not likely pose a threat to the community. Conversely, Dr. Delfin, a clinical psychologist who testified on behalf of the Commonwealth, opined that the Defendant showed signs of "rageful ideation, angry thoughts," and difficulty with impulse control. Dr. Larry Rotenberg, a forensic psychiatrist who testified on behalf of the Commonwealth, was of the opinion that the Defendant had difficulty managing his anger, and that the Defendant's conscience structure was immature of his age. If the Defendant did, in fact, kill his brother, it shows a leap from being an 'A' student with no history of disciplinary problems, to committing the most gruesome of crimes. Dr. Rotenberg testified that this in and of itself is no reason for pause. Normally, he testified, those who ultimately commit murder start with smaller crimes which eventually escalate to more serious offenses. While Dr. Rotenberg's testimony was given in response to questions about the Defendant's amenability to treatment, the answers impact equally on the issue of the Defendant's potential threat to the community. Likewise, Dr. Sadoff conceded that if, in fact, the Defendant committed the crime, and continues to deny his involvement up to and even

after a conviction, then his prognosis for rehabilitation is poor. The Court emphasizes that at all times prior to a jury's ultimate decision, the Defendant is clothed with the presumption of innocence. However, for purposes of these decertification proceedings, the Court must consider that the Commonwealth has made out a *prima facie* case against the Defendant, and the Court must weigh the statutory factors in that light. No challenge has been made by way of omnibus pretrial application or Habeus Corpus action. It is unclear what threat the Defendant would pose to other members of the community. Again, the burden is upon the Defendant to prove by a preponderance of the evidence that transfer to juvenile court is in the public interest. Given the nature of the testimony offered and the underlying circumstances we conclude the Defendant has not sustained his burden regarding this factor.[1]

(D) The nature and circumstances of the offenses allegedly committed by the child. The allegations of the Commonwealth portray a crime with a high degree of brutality and sophistication. Dr. Sadoff attested to the physical difficulty involved in nearly decapitating a person. If the allegations are true, the Defendant's actions would establish prima facie evidence of premeditation in establishing an alibi, as well as sophistication and calculation in terms of setting the scene to appear as a third party break in; consummating the crime in a short time period; concealing a weapon; and maintaining his composure and consistency of his cover story in the face of numerous interviews with authorities over time. The degree of

---

[1] The Court notes that testimony was offered by the Commonwealth regarding the HARE Psychopathy Checklist, which predicts, among other things, the dangerousness of an individual. However, the Court places no value in this report in the current context because it appears that this particular test is only valid for examining prison inmates over the age of eighteen, nor were appropriate protocols adhered to.

sophistication allegedly involved and the heinous nature of the crime are cause for concern and weigh against transfer to the juvenile system.

(E) The degree of the child's culpability. If the Commonwealth's contentions are true, the Defendant is completely and solely culpable for the crime charged. That level of culpability in a crime such as this favors that the Defendant remain in adult criminal court.

(F) The adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system. The Defendant has recently turned sixteen. That would allow for approximately five years of treatment if the trial were held in the juvenile system immediately and a conviction resulted. Dr. Sadoff testified that five years is an adequate amount of time to rehabilitate the Defendant. He testified that, regardless of whether the Defendant committed the crime or not, treatment rather than punishment would be more appropriate, and that the Defendant could be successfully treated in the juvenile system within five years. The Commonwealth presented testimony from Daniel Rhoads, the Chief Juvenile Probation Officer in York County. Mr. Rhoads testified that five years is an insufficient amount of time to address accountability issues given the seriousness of the crime. Accountability is one of the factors the Court must consider when evaluating the purposes of the Juvenile Act. The Court also heard from Barry Johnson, the Deputy Superintendent for Centralized Services at the State Correctional Institution at Houtzdale. Mr. Johnson testified that Houtzdale was established by legislation which was passed in conjunction with the 1995 amendments to the Juvenile Act concerning direct certification. Houtzdale has housing and programming specifically designed to handle juveniles who had been directly certified to adult court. Many of Houtzdale's programs are modeled after treatment centers for violent juvenile offenders, and the juvenile population is separated from the adult population. It appears from the testimony before the Court that

there are dispositional alternatives in the adult criminal system that can potentially address the same kinds of treatment issues that are addressed by juvenile facilities, yet would offer resources better suited to the kind of accountability required in a case such as this. The Defendant has not shown by a preponderance of the evidence that the adequacy and duration of disposition in the juvenile justice system would be sufficient to deal with the accountability concerns involved with this crime.

(G) Whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) Age. The Defendant was fifteen years old at the time he was alleged to have committed the crime. The Defendant has recently turned sixteen, which would leave approximately five years of treatment.

(II) Mental capacity. The Defendant was of at least average intelligence and achieved academic honors at school. Certainly the Defendant has the mental capability to be open to treatment.

(III) Maturity. Again we have differing testimony concerning the Defendant in this regard. Dr. Janofsky, a psychiatrist who testified on behalf of the Defendant, stated that the Defendant was immature for his age, stating that his psychological development was that of a twelve or thirteen year old. As noted above, Dr. Rotenberg also stated that the Defendant's conscience structure was underdeveloped for his age. Dr. Shapiro, a forensic psychologist who testified on behalf of the Defendant, reported that the Defendant's level of psychological development was at the level of a five to nine year old. However, another of the Defendant's psychiatrist's, Dr. Sadoff, testified that the Defendant *was* mature for his age. The Defendant's parents also indicated that the Defendant was mature and responsible, and was the one they depended on to

make sure Gregory got to the places he needed to be at the appropriate times. They indicated that the Defendant never behaved disrespectfully or inappropriately to adults or other authority figures, and never had conflicts with Gregory or other children.

(IV) The degree of criminal sophistication exhibited by the child. As the Court stated earlier, if the Commonwealth's allegations are true, the Defendant exhibited a disturbing degree of sophistication and calculation in the perpetration of the crime.

(V) Previous records, if any. The Defendant has no previous criminal record.

(VI) The nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child. The Defendant has no prior history of delinquency.

(VII) Whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction. Both Dr. Sadoff and Dr. Janofsky testified that five years is a sufficient time period to treat and rehabilitate the Defendant. Dr. Sadoff admitted that predicting potential rehabilitation amounts to a "fairly good educated guess." As noted above, Mr. Rhoads testified that five years is not sufficient to account for the issues of accountability present in this case. Further, all of the expert witnesses agreed that in the event that the Defendant is indeed guilty of the crime, and continues to maintain his innocense after a conviction, prognosis for rehabilitation is poor. Again, while the Court continues to presume that the Defendant is innocent, for purposes of this determination the Court must take into consideration that the Commonwealth has made out a *prima facie* case against the Defendant, and examine the relevant factors in that light. The Court must consider whether rehabilitation is possible if, in fact, the Defendant committed the crime. The burden to demonstrate his amenability to treatment rests with the Defendant.

(VIII) Probation or institutional reports, if any. There are o probation or institutional reports before the Court.

(IX) Any other relevant factors. All of the doctors who have examined the Defendant agree that he exhibits no signs of any mental disorders. The Court further notes that it is uncontested that the Defendant is not committable to an institution for the mentally retarded or mentally ill.

On the whole, it is a close question whether the Defendant is amenable to treatment within the juvenile justice system. While certain factors may indicate a receptiveness to rehabilitation, the Court is particularly concerned with the level of sophistication exhibited in the crime, as well as the need for a longer period of accountability should the Commonwealth's contentions ultimately be proven. The Court heard mixed testimony regarding the Defendant's maturity and openness to treatment alternatives. Accordingly, since it is a close call, the Defendant has not shown by a preponderance of the evidence that he is amenable to treatment in juvenile court. While the Court cannot accept the Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system, it is noteworthy that the case law found by this Court suggests that in cases where jurisdiction was transferred back to juvenile court, the affected defendants did indeed accept responsibility for the crime. *See e.g. Commonwealth v. Johnson*, 542 Pa. 568, 669 A.2d 315 (Pa. 1995), *Commonwealth v. Norcross*, C.R. No. 378-1997 (Pa. Ct. Com. Pleas 1997), *affirmed*, No. 325 Pittsburgh 1998 (Pa.Super. Pitt. Dist. 1998). In any event, the Defendant did not meet his burden in this case.

In conclusion, the Defendant has not proven by a preponderance of the evidence that the transfer of his case to the juvenile justice system would be in the public interest. The brutal nature of the crime, combined with the sophistication evidenced and the need for a greater accountability period than

five years lead the Court to determine that a trial in adult court is appropriate. Consequently, the relief requested by the Defendant is Denied. An Order in keeping with this Opinion shall issue forthwith.

BY THE COURT,

/s/

JOHN C. UHLER, PRESIDENT JUDGE

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 5411 CA 1998
	:	
vs.	:	
	:	
ZACHARY WITMAN	:	

ORDER

AND NOW, this 10th day of June, 1999, upon consideration of the Petition to Retain Juvenile Court Jurisdiction Pursuant to 42 Pa.C.S.A. §6322(a), the relief requested by the Defendant is hereby Denied. The Defendant shall be tried as an adult.

BY THE COURT,

/s/
JOHN C. UHLER, PRESIDENT JUDGE

J. A 36037/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P.65.37

COMMONWEALTH OF PENNSYLVANIA,	: IN THE SUPERIOR COURT : OF PENNSYLVANIA
Appellee	:
v.	:
ZACHARY P. WITMAN,	:
Appellant	: No. 1889 MDA 2004

Appeal from the Judgment of Sentence July 8, 2003
In the Court of Common Pleas of York County
Criminal Division at No. 541 CA 1998.

BEFORE: FORD ELLIOTT, JOYCE AND BECK, JJ.

MEMORANDUM: FILED: January 11, 2005

In this appeal from the judgment of sentence for first degree murder, appellant claims trial court error regarding the admission exclusion and use of certain items of evidence. Appellant also challenges the weight of the evidence, as well as the order denying decertification to juvenile court. We affirm.

On the afternoon of October 2, 1998, thirteen-year-old Gregory Witman got off the school bus and headed toward his New Freedom Borough home approximately two blocks away. He arrived at the residence at approximately 3:10 pm. Just seven minutes later, Gregory's fifteen-year-old brother, appellant Zachary Witman, called 911 to report that Gregory was lying

dead in their home, the victim of a knife attack. Gregory had been stabbed in the back and about the head, chest and neck over 60 times. His throat was cut, his windpipe and carotid artery were severed and he was nearly decapitated.

On October 10, 1998, police arrested Zachary for the murder of his younger brother. Trial was delayed for a period of years for several reasons, including a request for decertification to juvenile court and suppression issues that were litigated in the trial and appellate courts. Trial commenced in May of 2003 and the Commonwealth presented extensive circumstantial evidence tying Zachary to the crime.

Zachary was home on the day of the murder because he wasn't feeling well. According to statements he made to emergency personnel and police, Zachary spent much of the day sleeping and was in his bedroom on the second floor when his brother entered the house shortly after 3:00 PM. When Zachary heard "roughhousing" of some kind, he went downstairs to investigate and saw blood in the front hall. He discovered his brother's body in the laundry room in the back of the house and called 911.

An emergency squad arrived at the Witman residence and, ultimately, Zachary was taken to the hospital for examination. A towel used by emergency personnel to wipe Zachary's hands while en route to the hospital was found to contain Gregory's blood and soil consistent with the dirt in the Witman's yard. Emergency personnel transporting Zachary to the hospital and medical personnel at the hospital noticed a cut on Zachary's hand that, according to one source, was "oozing" when Zachary's hands were washed. Zachary explained the origin of the cut in different ways to different people. He told one person that he was injured while playing with his dogs; he told another that he must have been hurt when he "felt something

sharp" as he moved his brother's body.

With the use of luminal, police observed footprints leading from a back door of the home to some pine trees in the rear of the yard. The knife that was used to accomplish the murder and a pair of blood-soaked soccer gloves worn by the perpetrator were found buried beneath these trees. The luminal-enhanced prints reversed their direction at the pine trees and led back into the Witman home.

The murder weapon was a pen knife with a Baltimore, Maryland automobile parts company insignia on it, the type of item used for promotional purposes. Evidence revealed that Zachary had a collection of pen knives and that Ronald Witman, the boys' father, once owned an automobile parts store in the Baltimore area.[1]

Deborah Calhoun, an expert in serology and bloodstain pattern analysis, testified that Zachary was in "very close proximity" to Gregory at the time he was being attacked because "arterial spurting" and "impact spatter" stains were visible on Zachary's sweatshirt. In response to suggestions that Zachary's shirt was stained only as a result of his moving Gregory's body on the instruction of the 911 operator, Calhoun testified that while a few of the stains "may be consistent with that scenario," the others simply were not, because they were the result of active, pressured bleeding and could only have occurred at the time of the attack. Calhoun's testimony was supplemented by

---

[1] Zachary's pen knife collection was seized by police and one of the items in it, a knife displaying another automobile parts company insignia, was shown to the jury to establish the similarity between the knives Zachary owned and the knife used to kill Gregory.

that of pathologist Sarah Funke, who testified that the nature of Gregory's injuries caused him to "bleed out" very quickly, such that by the time the last cut to his neck was made, he had no effective blood pressure that could have caused the spurting of blood.

The jury found Zachary guilty of first degree murder and he was sentenced to life in prison. He retained counsel, who filed post-sentence motions, which were denied by the trial court. We now address the issues raised in appellant's timely appeal to this court.

– LACK OF MOTIVE EVIDENCE –

Appellant's first claim of error concerns the trial court's exclusion of certain evidence appellant characterizes as "lack of motive" evidence. The record reflects that at trial, appellant asked one of the Commonwealth witnesses whether she had ever seen Zachary hurt Gregory. The Commonwealth objected to the question as improper character evidence and the trial judge sustained the objection on that basis. Later, when conducting direct examination of Mr. and Mrs. Witman, counsel attempted to elicit testimony regarding the boys' love for one another. Again, the attorney for the Commonwealth objected on the basis that the testimony was improper character evidence.

In his post-sentence motions, new counsel for Zachary asserted that the trial court erred in refusing to admit evidence of Zachary's love of his brother as such evidence was inadmissible to show lack of motive. Counsel appended to his motion affidavits from thirty-six friends, relatives and acquaintances of Zachary, all of whom commented on appellant's loving relationship with his younger brother.

Counsel argues that this evidence was admissible because it went to lack of motive and so was probative of several elements of the crime, including identity, intent and malice.[2] However, the record establishes that trial counsel never offered the evidence on this basis. First, nearly all of the thirty-six witnesses who signed affidavits are "new" witnesses in that they were not offered as witnesses at trial. Second, with respect to those few witnesses who did testify and were asked to comment on Zachary's relationship with his brother, in not one instance did trial counsel argue that their testimony was admissible to show lack of motive. Rather, trial counsel elicited the testimony, the Commonwealth objected on the basis of improper character evidence, the trial judge ruled that the Commonwealth was correct and trial counsel made no further argument for admissibility.

While new counsel now asserts that the evidence was not offered as character evidence, and, further, makes an argument for why the evidence was admissible in the alternative as proof of lack of motive, this claim simply was not preserved at trial. As a result, it is waived.[3]

---

[2] We point out that the Commonwealth is not required to prove motive. **Commonwealth v. Keaton**, 556 Pa. 442, 729 A.2d 529, 536 (1999).

[3] Even though present counsel raised the issue in post-sentence motions, he did not present the claim in the context of ineffective assistance of counsel. Nothing prevents appellant from making such a claim in a subsequent petition for collateral relief. **Commonwealth v. Grant**, 572 Pa. 48, 813 A.2d 726 (2003).

The Commonwealth asserts that even if the evidence had been proffered at trial in this "new" context, it would have been inadmissible as contrary to this court's holding in **Commonwealth v. VanHorn**, 797 A.2d 983 (Pa. Super. 2003). In **VanHorn**, the appellant was convicted of committing sexual offenses against his grandson. In his petition for collateral relief, he argued that trial counsel was ineffective for failing to offer testimony from relatives who would have commented on the good relationship between grandfather and grandson. A panel of this court held that such evidence was inadmissible because it did not fall within the parameters of proper character evidence. Specifically, the panel ruled that the relationship between the defendant and the victim, as perceived by those relatives, did not address the defendant's "general reputation in the community" and so would have been inadmissible as character evidence. **Id.** at 988.

While it is true that the evidence at issue here is similar to that in **VanHorn**, appellant concedes that the evidence does not fit within the confines of character evidence and instead claims that the evidence is admissible *on its own* for a reason separate from and different than character evidence. Appellant insists that the evidence is admissible to establish lack of motive. **VanHorn** did not address such a claim; therefore, it is not controlling and we cannot rely on it to find that the evidence would have been inadmissible in any event.[4] Appellant's claim was not preserved at trial and so we will not address its merits.

---

[4] We also decline to address the Commonwealth's assertion (and the trial court's apparent conclusion) that the evidence would be inadmissible in any event as improper lay opinion and/or that the exclusion of the evidence was harmless error because the Commonwealth conceded at trial that it could not establish motive.

– Hearsay Evidence –

Appellant next argues that certain evidence offered by one of his witnesses should have been admitted for its truth and the trial court's contrary direction to the jury was erroneous. The testimony at issue was that of Dr. Scott McCurley, the emergency room physician who examined Zachary. Dr. McCurley repeated to the jury that Zachary told him about the incident, specifically, that Zachary was resting in his bedroom when he heard Gregory come home from school. Zachary told Dr. McCurley that he heard "a commotion" and went downstairs, where he discovered his brother's body. According to Dr. McCurley, Zachary said he couldn't believe what he saw.

In his brief, appellant asserts that these statements made by Zachary, and presented to the jury *via* Dr. McCurley, were admissible as substantive evidence under two independent exceptions to the hearsay rule: excited utterance (Pa.R.Evid. 803(2)) and medical diagnosis and treatment (Pa.R.Evid. 803(4)). Contrary to those Rules, argues appellant, the trial judge instructed the jurors that the statements were not to be considered fir their truth. Appellant asserts that this was error and that a new trial is warranted as a result.

As he did with his first issue, appellant makes a logical and coherent argument in support of admitting Dr. McCurley's testimony as substantive evidence, particularly in the context of the excited utterance exception to the hearsay rule. However, the very same problems that were present in appellant's first issue are also present here; namely, trial counsel simply did not preserve this claim for appellate review. The record reflects that trial counsel never asserted the medical diagnosis or treatment exception set out in Rule 803(4). He made no argument on the basis of this Rule and simply acquiesced when the trial court

instructed the jury on the limited use of the evidence.

Trial counsel argued that Zachary's statements were admissible via McCurley for the same reasons that statements of the emergency rescue worker (a Commonwealth witness) were admissible, that is, as admissions of a party opponent and excited utterance. First, the statements could not be admissible as admissions of a party opponent since they were being offered by Zachary and Zachary's behalf. Second, with regard to the excited utterance exception, the record shows that trial counsel failed to develop his claim, even though the trial judge prompted him to do so in a sidebar discussion:

> The Court: If [you claim] it's an excited utterance, then the issue is are these excited utterances.
> Trial Counsel: He [Dr. McCurley] said he [Zachary] was hyperventilating, Judge.
> The Court: What are you specifically attempting to cull out here, Attorney Kelley, so I have an opportunity to –
> Trial Counsel: We are gong to cut this Gordian knot, my main concern with the doctor is his injuries and physical examination. Let's cut the knot, and I'll hone in on that.
> The Court: I wanted to let you know, I am willing to focus on these issues, but if you –
> Trial Counsel: We got enough out about what he was like that day.
> The Court: All right. That's all.

N.T. 5/16/03 at 1628-29 (emphasis supplied).

It appears that counsel abandoned his claim that the statements constituted excited utterances; he did not pursue the

exception even though the court made it clear that he was entitled to do so. As a result, new counsel's compelling arguments that the exception indeed applied are irrelevant as the issue simply was not preserved at trial.[5]

– Jury Instructions –

Appellant next claims that the trial court erred in refusing to instruct the jury that bloodstain pattern expert witness Deborah Calhoun's opinion testimony should be considered of "low grade" value.

The low grade instruction concerns the weight to be given an expert's opinion and has been part of our jurisprudence for over fifty years. It provides that "opinion evidence should be classified as low grade when the expert testified, not from personal observation, but when the expert expresses an opinion in response to a hypothetical question, or where the expert's opinions, based on theoretical assumptions, is rebuttal by direct evidence." **Commonwealth v. Hernandez**, 615 A.2d 1337, 1344 (Pa. Super. 1992).

Initially, use of the instruction centered on opinions of lay witnesses and psychiatric experts on the topic of sanity. **See e.g., Commonwealth v. Woodhouse**, 401 Pa. 242, 164 A.2d 98 (1960); **Commonwealth v. Patskin**, 375 Pa. 368, 100 A.2d 472 (1953); **Commonwealth v. Heller**, 369 Pa. 457, 87 A.2d 287 (1952). However, in recent decades, use of the instruction has

---

[5] As with the claim regarding lack of motive evidence, nothing precludes appellant from asserting trial counsel's ineffectiveness with regard to the admission of Dr. McCurley's testimony on collateral review. **Grant, supra**.

been expanded to other forms of expert testimony.

In **Commonwealth v. Thomas**, 448 Pa. 42, 292 A.2d 352 (1972), our state supreme court considered whether the opinion of a fibers expert should have been accompanied by a low grade instruction. The **Thomas** court rejected application of the instruction in that case, but since **Thomas**, our courts have considered application of the low grade instruction in a variety of expert opinion scenarios. **See e.g., Commonwealth v. Davis**, 518 Pa. 77, 541 A.2d 315 (1988) (addressing child psychologist's opinion on victims of child sexual abuse); **Commonwealth v. Jackson**, 481 Pa. 426, 392 A.2d 1366 (1978) (addressing forensic pathologist's opinion on cause of internal injuries); **Commonwealth v. Cooper**, 411 A.2d 762 (Pa. Super. 1979) (addressing ballistics expert's opinion on test-firing); **Commonwealth v. Correa**, 620 A.2d 497 (Pa. Super. 1993) (addressing police officer's opinion on drug packaging); **Commonwealth v. Hernandez**, 615 A.2d 1337 (Pa. Super. 1992) (addressing child abuse expert's opinion on consistency of allegations as compared to physical findings).

Despite the breadth of cases discussing the low grade instruction, in most instances the instruction has been deemed inappropriate and so its application remains "constrained." **Hernandez, supra** at 1344. Indeed, the instruction rarely has been held applicable. The very few cases that have held the instruction was warranted include the case of an expert opinion that had a purely hypothetical basis and the case of an expert opinion that was directly rebutted by other evidence. **See Davis, supra** (noting that expert psychologist never examined victim and instead testified as to the general tendencies of all child victims of sexual abuse); **Kramer, supra** (discussing opposing points of view by parties' respective pathology experts; one stated that cause of injuries was clear from examination of the body and the other stated that cause of injuries was not

anatomically apparent).

In this case, Deborah Calhoun gave extensive and thorough testimony about her examination of appellant's sweatshirt and the bloodstains that appeared on it. Calhoun explained in detail the nature of each stain; she told the jury why she believed appellant was very close to Gregory while he was being stabbed. She described the multiple tests she conducted and the conclusions she reached.

It is clear that the first basis for allowing the low grade instruction is not present here; Ms. Calhoun's opinion was based on her examination of physical evidence, not on hypothetical scenarios. Appellant concedes as much and instead argues that the second basis for the instruction applies in this case; that is, there was direct evidence offered to rebut Calhoun's testimony.

Appellant claims that Ms. Calhoun's testimony regarding the origin of the bloodstains was rebutted by evidence that appellant moved Gregory's body, which in turn caused the bloodstains on the sweatshirt. This argument is flawed for two reasons.

First, whether and to what extent appellant moved Gregory's body simply was not established by direct evidence. Appellant did not testify at trial. Instead, the only thing that could be considered evidence of appellant's contact with the body was the 911 tap wherein appellant told the operator he had moved the body. At best, this evidence only raised an inference that appellant moved Gregory's body; it is not direct evidence of same.

Second, even if we were to consider the 911 tape as direct evidence that appellant moved Gregory's body, it still would not rise to the level of evidence that *rebutted* Ms. Calhoun's

testimony. Ms. Calhoun's opinion was that appellant's sweatshirt had "impact spatter" and "arterial spurting" bloodstains, making appellant present at the time of the attack and right next to the victim as he was stabbed. Calhoun explained her opinion, and the principles upon which it was based, in painstaking detail. On cross examination, she testified that the stains were not consistent with appellant's mere movement (lifting and rolling over) of Gregory's body.

Appellant's counsel did not offer any evidence that the bloodstains were the result of Zachary's post-attack contact with the victim's body; counsel merely argued that inference to the jury as part of his closing statement. Argument is not direct rebuttal evidence. In this case, only evidence that offered an opinion different from or contrary to Ms. Calhoun's opinion could be said to have *rebutted directly* her testimony. **See Kramer, supra** (holding that low grade instruction was warranted because one expert pathologist testified that the cause of injuries was clear from examination of the body and the other expert pathologist testified that the cause of injuries was not apparent from examination of the body). **See also Hernandez**, supra (holding that low grade instruction not warranted where Commonwealth's expert's opinion was not rebutted by other expert testimony or by the physical evidence); **Jackson, supra** (finding that absence of direct evidence in conflict with Commonwealth's pathology expert precluded low grade instruction); **Thomas, supra** (noting that low grade instruction inappropriate as defense expert did not contradict Commonwealth's expert).

In light of the relevant case law, as well as the record in this case, we conclude that Ms. Calhoun's testimony did not merit the classification of "low grade" and so the trial court did

not err in refusing to give such an instruction to the jury.[6]

– Decertification –

Appellant next challenges the trial court's order denying his request for a transfer from criminal court to juvenile court. When a juvenile is accused of murder, his conduct is not considered a delinquent act and he must face charges in criminal court. 42 Pa.C.S.A. § 6302. While a transfer to juvenile court is possible, treatment in the juvenile system does not arise as a matter of right; instead, the juvenile bears the burden of establishing that decertification to juvenile court is appropriate. **See** 42 Pa.C.S.A. § 6322(a). Section 6322(a), in turn, directs a court faced with a decertification request to consider the factors set out in 42 Pa.C.S.A. § 6355(a)(4)(iii):

> (A) The impact of the offense on the victim or victims;
> (B) The impact of the offense on the community;
> (C) The threat to the safety of the public or any individual posed by the child;
> (D) The nature and circumstances of the offenses allegedly committed by the child;

---

[6] We note that the trial judge gave the jurors a lengthy instruction regarding Ms. Calhoun's testimony, cautioning them to evaluate Ms. Calhoun's expertise and to ascertain what weight, if any, was to be given her testimony. We find this instruction adequately, accurately, and clearly presented the relevant law to the jury and was sufficient to guide the jurors in their deliberations. **Commonwealth v. Hamilton**, 766 A.2d 874 (Pa. Super. 2001).

> (E) The degree of the child's culpability;
> (F) The adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
> (G) Whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors: (I) Age; (II) Mental capacity; (III) Maturity; (IV) Degree of criminal sophistication exhibited by the child; (V) Previous records, if any; (VI) The nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) Whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) Probation or institutional reports, if any; and (IX) any other relevant factors:

42 Pa.C.S.A., § 6355(a)(4)(iii).

The decision whether to transfer a murder case to the juvenile court it left to the sound discretion of the hearing judge; an abuse of that discretion will not be found upon "merely an error of judgment , but must be [based on] a misapplication of the law or an exercise of manifestly unreasonable judgment based upon partiality, prejudice or ill will." **Commonwealth v. Austin**, 664 A.2d 597, 598-99 (Pa. Super. 1995). Here, appellant's single claim with respect to the denial of decertification is that the court misapplied the law by relying on an impermissible factor, namely, appellant's failure to admit culpability.

Appellant makes a forceful argument that a trial court may not base its decertification decision on a juvenile's refusal to admit he committed the crime in question. Appellant reasons that the exercise of one's constitutional privilege against self-incrimination should not dictate whether one is amenable to treatment in the juvenile system. We agree. However, the record does not establish that the trial court relied on this impermissible factor in reaching its decision.

Appellant asserts that the trial court "repeatedly focused on the failure of appellant to admit culpability" and that this impermissible concern is "threaded through" the court's opinions and findings of fact. In fact, the court twice mentioned appellant's decision to maintain his innocence, once in reference to a statement made by appellant's expert and again in noting several other cases where a juvenile accepted responsibility for the crime and decertification ultimately was granted. However, in both instances, the trial court emphasized the fact that appellant was presumed innocent. Indeed, the court underscored appellant's right to such a presumption and explicitly rejected the "Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system." Trial Court Opinion 6/11/99 at 14.

We have review the entire twenty-four page opinion in support of the trial court's order denying decertification. It is clear that the court, while admitting the question was a close one, was troubled by several concerns, including the brutal nature of the crime, the sophistication shown in its commission and the need for an accountability period in excess of that available in the juvenile system. The trial court, relying on experts from both the defense and the prosecution, ultimately concluded that appellant had not met his burden in establishing that his case should be transferred to juvenile court. Although appellant insists this decision was based on the fact that appellant had not

admitted his culpability, the record does not support appellant's claim. As a result, he is not entitled to relief.

– Weight –

Appellant's last claim is that the verdict was against the weight of the evidence. When reviewing the trial court's denial of a new trial based on a weight of the evidence claim, we determine whether the trial judge abused his discretion in finding that the verdict did not shock the conscience. Commonwealth v. Sullivan, 820 A.2d 795, 805 (Pa. Super. 2003). We can find no abuse of discretion here. Although the evidence presented by the Commonwealth, including extensive expert testimony, was entirely circumstantial, it demonstrated that appellant was responsible for the victim's death and so the jury's verdict was not shocking. We find no abuse of discretion in the trial court's denial of appellant's weight claim.

Because appellant's claims were either not preserved at time of trial or are without merit, we are compelled to affirm.

Judgment of sentence affirmed.

Judgment Entered.

/s/
Prothonotary

Date: JAN 11 2005

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 96 MAL 2005
	:	
	:	Petition for Allowance
Respondent,	:	of Appeal from
	:	the Order of the
v.	:	Superior Court
	:	
ZACHARY P. WITMAN,	:	
	:	
Petitioner	:	
	:	
	:	
	:	

ORDER

PER CURIAM

AND NOW, this 12th day of May 2005, the Petition for Allowance of Appeal is hereby DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 14, 2005

Ms. Amy Adelson
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001

Re: Zachary P. Witman
v. Pennsylvania
Application No. 05A52

Dear Ms. Adelson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on July 14, 2005 extended the time to and including October 9, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By /s/

Jeffrey Atkins
Case Analyst

No. 05-444

In The
Supreme Court of the United States

ZACHARY WITMAN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

H. STANLEY REBERT
District Attorney
Counsel of Record
TIMOTHY J. BARKER, ESQ.
First Assistant District Attorney
YORK COUNTY DISTRICT
ATTORNEY'S OFFICE
York County Judicial Center
45 N. George Street
York, PA 17401
(717) 771-9600

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTION PRESENTED

Does Petitioner raise a matter meriting review by this Honorable Court when Petitioner's issue concerning the trial court's denial of Petitioner's motion to transfer his charges of Murder of the First Degree to the jurisdiction of the juvenile court is solely premised upon material misstatements of the opinions authored by the trial court and the Pennsylvania Superior Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES:

STATEMENT OF JURISDICTION

On May 12, 2005, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioner. Such an order constitutes a final order and invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

COUNTER-STATEMENT OF THE CASE

A. Procedural History

Petitioner, Zachary Witman, was charged on October 10, 1998, with Criminal Homicide for the murder of his 13 year old younger brother, Gregory Witman. Petitioner, who was fifteen, was charged as an adult with this murder, as the Juvenile Act mandates that all crimes of murder must be filed in the adult justice system. On May 7, 1999, and May 13, 1999, the trial court held hearings on Petitioner's motion to have this case transferred to juvenile court. The trial court denied this motion on June 10, 1999.

Additionally, Petitioner filed pretrial motions requesting the suppression of numerous items of evidence. The subsequent order of the trial court granting in part and denying in part Petitioner's motion to suppress evidence led to extensive pretrial appellate litigation. This appellate review included the filing of a petition for writ of certiorari by Petitioner to this Court, docketed at No. 00-1710, which this Court denied.

On May 5, 2003, jury selection began for the trial of Petitioner. The jury was selected from Montgomery County, Pennsylvania, based upon a change of venire order entered by the trial court with the agreement of the parties. Following a two-week trial and lengthy deliberation by a

sequestered jury, the jury found Petitioner guilty of Murder in the First Degree.

On July 8, 2003, the trial court sentenced Petitioner to life imprisonment without parole. The trial court denied Petitioner's post-sentence motions on November 3, 2003. Upon consideration of a direct appeal by Petitioner, the Superior Court of Pennsylvania ruled against Petitioner and affirmed the judgment of sentence. On May 12, 2005, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioner. This petition followed.

B. Statement of Facts

On October 2, 1998, Petitioner brutally slaughtered and nearly decapitated his 13 year old brother, Gregory Witman, in their residence after Gregory returned home from school. An autopsy revealed 65 stab wounds to Gregory, including a gaping wound across Gregory's neck that sliced through his right external and internal jugular veins, the right carotid artery, the trachea, the esophagus, and the left external and internal jugular veins. The depth of the wounds established that the blade used to inflict these injuries was 1¼ inches long.

The Commonwealth concedes, as it did at trial, the lack of a motive for Petitioner to commit such a heinous and unspeakable crime against his brother. Contrary to the assertions of Petitioner, who continues to mischaracterize the quantum and quality of the Commonwealth's evidence, the forensic evidence and the evidence of opportunity overwhelmingly proved that Petitioner murdered his younger brother. In addition, this evidence directly

refuted Petitioner's claim that someone else committed this crime.

On October 2, 1998, Petitioner, who was fifteen when he committed this murder, stayed home from school due to a stomachache. Petitioner was the only member of his family home during the murder of Gregory. Additionally, Petitioner's neighbors did not notice anything unusual at the Witman residence, nor did they see any unfamiliar people in the neighborhood, around the time of the murder.

During the crime scene processing of Petitioner's house with luminol, the police discovered a set of footprints leading from the family room of the Witman residence to a patch of disturbed soil under a tree in the backyard. The police found sports gloves caked with blood and dirt, as well as a knife with a blade matching the size of the one used to kill Gregory. The footprints then led back into the residence. These footprints looked like a foot without a shoe due to the absence of a tread pattern.

The knife used to murder Gregory possessed a yellow handle with a NAPA City Motor Parts logo. The handle also had a Baltimore, Maryland address and phone number inscribed on it. This knife was similar to those found in Petitioner's knife collection in his bedroom. In particular, Petitioner owned a knife with a red handle and an AP Long-lasting Mufflers logo. This is significant because Ronald Witman, Petitioner's father, once owned The Pit Stop, an auto parts store located in Baltimore, Maryland. Promotional items, such as pen knives (similar to the murder weapon) were frequently given to such stores by distributors.

When police and emergency personnel first encountered Petitioner at his home after the murder, an EMT noticed that Petitioner had a fresh cut on the inside of his left ring finger. Petitioner initially stated that he had cut his finger the day before. When the EMT stated that it was a fresh cut, however, Petitioner changed his story and claimed that he hit something sharp when he rolled Gregory over, which was part of Petitioner's story in attempting to explain the significant amount and type of blood on Petitioner's clothing. Petitioner changed his story yet again when he told a doctor at York Hospital that he sustained the cut while playing with his dogs.

Soil comparisons that were conducted on a pair of white athletic socks worn by Petitioner during the murder, the pair of gloves and knife found in the backyard, a white towel used to wipe the cut left hand of Petitioner, a door latch on the back screen door of Petitioner's house, and Petitioner's bloodstained light blue sweatshirt that he wore during the murder. These items were compared to a sample of soil obtained from the area where police found the gloves and knife. The white socks, the gloves, the knife, the white towel, and a portion of the door latch contained traces of soil consistent in color and features with the soil sample where police found the gloves and knife. Most notably, the presence of mica was detected in the soil that was found on each of these items and in the comparison sample. Especially significant is the soil on the towel used by the EMT to clean the Petitioner's hands in the area of his fresh cut after the murder. Experts did not find any trace of soil on the front, the back, the arms, or the inside of his sweatshirt. This evidence directly refuted Petitioner's claim that he wiped his hands on his

sweatshirt, causing the bloody swipe marks found on the sweatshirt.

Despite Petitioner's contention that someone else committed this crime, only interfamilial DNA was found at the scene. Police recovered several hair fragments from the scene: (1) hair fragment from the door molding; (2) hair fragment from Gregory's right forearm; (3) hair fragment from Gregory's neckline; (4) hair fragment from Gregory's throat; and (5) four hair fragments from the glove. An analysis of the mitochondrial DNA contained in the hair fragments revealed that Petitioner, Gregory Witman, and his parents, Amelia Sue and Ronald Witman, were the possible source(s) of these hair fragments. Moreover, nuclear DNA analysis of the backpack, the clothing from Petitioner and Gregory, the black right hand glove, and the yellow-handled knife only revealed Gregory's DNA.

The Commonwealth also presented the expert testimony in serology and bloodstain pattern analysis. Among the items submitted for this analysis were: a backpack, a lanyard with attached key, a blue jacket, decorative silver items, a tablecloth, carpet from the laundry room, clothing from Petitioner and Gregory, blood lifts from the crime scene, and photographs of the crime scene.

With the assistance of the serology and blood stain pattern evidence, the Commonwealth was able to establish how the murder occurred, including the rooms traveled by Gregory and Petitioner during this vicious attack. Moreover, an analysis of the bloodstain patterns on Petitioner's clothing definitively established Petitioner's role as the murderer of his brother.

Regarding Petitioner's socks, which contained soil consistent with that where police found the gloves and knife, Petitioner's socks possessed dripped bloodstains from Gregory's blood on the tops with smearing and contact stains, which is consistent with blood being dripped over the top of the socks. Contact staining was present in the toe, upper foot areas, and heel. Dirt areas existed on the socks that outline where the foot is placed on the ground. Further examination with a stereomicroscope revealed that blood and dirt had worn off of the top level of fiber, as though the socks were walked on after acquiring the blood and dirt. The condition of Petitioner's socks was consistent with Petitioner walking in the backyard to bury the knife and the gloves, after having walked through some of Gregory's blood.

Next, Petitioner's sweatshirt contained numerous and varied bloodstains from Gregory's blood. First, Petitioner's sweatshirt contained a transfer pattern of bloody fingers, consistent with injuries on Gregory's hands. Second, the sweatshirt possessed hair swipes on the mid-chest and abdominal areas, as well as a cast-off finger pattern on the front. Third, the sweatshirt contained impact spatter on the chest and abdominal areas and on the front of the sleeves. This impact spatter in the torso area was larger than the spatter found on the ends of the sleeves. The front left shoulder area, however, was free of bloodstains. Most significant was the bloodstain on the left arm of the sweatshirt – the pattern was consistent with arterial spurting.

This examination of the stains on sweatshirt enabled the expert in serology and bloodstain pattern analysis to conclude that Petitioner would have been in "very close proximity" to Gregory while he inflicted the fatal injuries.

In particular, Petitioner's left arm would have necessarily been close to the injury site in order to receive the arterial pulse that left this trademark stain. Furthermore, Gregory's bloodstains on Petitioner's sweatshirt were not consistent with Petitioner merely lifting and rolling Gregory over, as Petitioner asserted to the authorities.

The results of the forensic autopsy conducted on Gregory supported the conclusion that Petitioner was in very close proximity to Gregory when Petitioner severed Gregory's right carotid artery. Because Petitioner severed one main artery in Gregory, pulsatile bleeding occurred. Due to the rapid loss of blood pressure that occurred, the forensic pathologist concluded that Gregory, due to the severity of his injuries, "bled out extremely quickly." Such rapid bleeding would have prevented Petitioner from receiving the arterial pulse stain on his sweatshirt unless he was present with Gregory when the artery was severed.

Moreover, this evidence directly contradicted Petitioner's claim that blood spurted onto him as he attempted to move Gregory. Given the length of time between the final injury and when Petitioner claimed he moved Gregory, Gregory's blood pressure would have been too low for arterial spurting to occur. Petitioner obtained the arterial spurt from Gregory through the final beats of his heart after Petitioner severed Gregory's right carotid artery at Gregory's final resting place on the laundry room floor.

On May 7, 1999, and May 13, 1999, the trial court held hearings on Petitioner's motion to have this case transferred to juvenile court. Both the Petitioner and the Commonwealth presented extensive evidence for the trial court's consideration, including the testimony of experts on behalf of each respective party. On June 10, 1999, the trial

court denied Petitioner's request to transfer his case to the jurisdiction of the juvenile court.

In this transfer opinion, the trial court based its decision to deny Petitioner's motion upon the brutality of the crime, the sophistication with which the crime was committed, and the need for a greater accountability period. The trial court demonstrated a thorough and methodical review of each consideration mandated by the legislature concerning transfer petitions. The trial court recognized that this crime had a great impact upon the victim and the community within and surrounding where the Witman's lived. Petitioner's App. 15-16. The trial court emphasized that a high degree of brutality and sophistication existed in Gregory's murder. The trial court further noted that "[i]f the allegations are true, the [Petitioner's] action would establish prima facie evidence of premeditation in establishing an alibi, as well as sophistication and calculation in terms of setting the scene to appear as a third party break in: consummating the crime in a short time period; concealing a weapon; and maintaining his composure and consistency of his cover story in the face of numerous interviews with authorities over time." Petitioner's App. 21. The trial court further held that Petitioner failed to show by a preponderance of the evidence that the juvenile justice system, which would have only provided five years of supervision, was adequate in scope and duration to accommodate the accountability issues associated with this crime. Petitioner's App. 19.

In litigating the transfer petition issue, the Commonwealth in part urged the trial court to reject Petitioner's contention that he was amenable to treatment in the juvenile justice system because Petitioner's failure to accept responsibility for Gregory's murder would render